ANTITRUST DEVELOPMENTS IN THE EUROPEAN COMMON MARKET

HEARINGS

BEFORE THE

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OF THE

COMMITTEE ON THE JUDICIARY

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SUMMARY OF CONFERENCES IN EUROPE
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SUMMARY OF CONFERENCES IN EUROPE*

INTRODUCTION

In connection with its study of antitrust developments in Europe and especially the Common Market, the Subcommittee on Antitrust and Monopoly held a series of conversations in Europe with European and American lawyers, professors, businessmen, and others directly concerned with these developments and with their significance for American interests. These conferences took place in Brussels on April 15–18, 1963, in Paris on April 19–20, and in London on April 22, 1963. A complete list of those with whom the subcommittee met appears in appendix A attached hereto.

The subcommittee was represented by Senator Estes Kefauver, chairman, and Robert Bevan, Esq., representing Senator Edward V. Long of Missouri who was unable to attend personally. Chairman Paul Rand Dixon of the Federal Trade Commission also participated, and made a very valuable contribution to the subcommittee's work.

In order to assure a free and uninhibited exchange, it was agreed that no verbatim transcript of the conversations would be taken, but only notes. It was further agreed that on the basis of these notes by staff members, a narrative summary of points discussed and viewpoints presented would be published, without either attribution or quotation, except for the formal statements by Senator Kefauver and EEC Commission member Hans von der Groeben, which appear at the opening of this report.

As the schedule set forth in appendix A hereto indicates, the subcommittee met with numerous representatives of business, Government, law and the universities, thereby obtaining a diversity of views and numerous facts. Many of these were able to discuss both Common Market and the various national antitrust developments, because the expanded volume of intra-European trade now requires those concerned with antitrust to be expert in the antitrust laws and practices of all the Common Market countries. The subcommittee was therefore able to get many different viewpoints on most of the points which were raised.

It must be stressed that this narrative summary does not seek to analyze, interpret or otherwise comment on any of the issues and viewpoints set forth in this report. Its only purpose is to set forth as fully and accurately what the subcommittee was told, in the belief that the Congress, the Executive and the American legal, academic, and business community are interested in current thinking in Europe about these antitrust developments.

*This summary was prepared by Herman Schwartz, assistant counsel of the subcommittee.

The subcommittee meetings in Europe were preceded by a staff study of some 4 weeks by Herman Schwartz, assistant counsel to the subcommittee, which included some 60 on-the-spot interviews between March 17 and April 9, in Belgium, France, Holland, Switzerland, Germany, and England. A full report on the staff interviews, the subcommittee meetings and background study, together with an extensive appendix containing material compiled in Europe will be issued in the near future.

The subcommittee wishes to express its deepest appreciation to the many persons who have assisted and are continuing to assist in this study.

STATEMENT BY SENATOR ESTES KEFAUVER (DEMOCRAT, OF TENNESSEE) AT OPENING OF MEETINGS IN EUROPE APRIL 15, 1963

This week we begin the oversea phase of our study of antitrust developments in Europe and particularly in the Common Market. We are here to learn, to exchange ideas and experiences, and to assess the significance of these European national and supranational developments for American public and private interests. In our conversations, which will be informal and private, we will try to determine what these laws are designed to accomplish, how they affect American investment, industry, exports and imports, and the administration and operation of American antitrust law. We hope that this interchange will be helpful in furthering closer ties within the Atlantic Community.

Europe is now engaged in a great and revolutionary experiment in economic integration; the development and maintenance of competition is an essential part of this great project. The fate of this experiment will affect us in the United States directly and profoundly, for the shrinkage of time and space have brought Europe and the United States practically at each other's doorstep. It took us only 6 hours to get here from New York. If all goes well, communication between New York and Brussels may soon become as easy and perhaps as inexpensive as communication between New York and Los Angeles. American business has long recognized this and has steadily increased its activities in Europe, and the Common Market in particular.

Obviously, these economic developments are of more than private business significance. For one thing, our international trade position is so vital to our national well-being that it is incumbent upon those of us concerned with public policy to be fully informed of all factors which affect that trade position. It is peculiarly the function of the Antitrust and Monopoly Subcommittee to keep abreast of the antitrust aspects of our international affairs, and this is why our subcommittee has embarked on this study. As pointed out by several of those who discussed these matters with us in Washington, a full and thorough study of these antitrust laws will serve to enlighten both official and private opinion about the great significance of this new Western World phenomenon, to borrow Judge Loevinger's phrase.

The subcommittee is deeply grateful for the support and encouragement it has received from Under Secretary George Ball and the State Department, the Federal Trade Commission, and other Government agencies. We are especially appreciative of the invaluable assistance and cooperation given us by the various European public and private experts without which this study could not have been made.

The subcommittee expects to learn much from these conversations. We hope also they will prove beneficial to all concerned with the furtherance and preservation of national and international competition.

ADDRESS BY HANS VON DER GROEBEN, MEMBER OF THE COMMISSION, EUROPEAN ECONOMIC COMMUNITY, WITH SPECIAL RESPONSIBILITY FOR COMPETITION; CHAIRMAN OF THE COMMISSION'S COMPETITION GROUP, APRIL 16, 1963

Hopes and disappointments are often near allied, and despite the proverbial optimism of Americans you have probably set out on your journey with anxious hearts because the so-called Brussels crisis has been disappointing your hopes—not only yours—for some weeks now. For you the temporary breakdown of the accession negotiations with Great Britain is linked with the fear that the European Economic Community may develop into a protectionist club, a new incarnation of out-of-date national egoisms in a somewhat bigger framework.

I am thoroughly convinced that such anxieties are unfounded. With the political and economic interests of the European peoples so closely interwoven, any injury to others is sooner or later felt as injury to oneself. Since our unity of interests is sufficiently strong, any action directed against the common interest mobilizes forces which press for corrective action. Without wishing to minimize the difficulties involved in the addition of new members to the European Economic Community, we may therefore hope for solutions which will work against any tendency for Western Europe to draw apart politically, and economically to develop on divergent lines.

In the same way we may be confident that the dramatic agreement which you decided to seek when you approved the Trade Expansion Act will be reached. I can only emphasize President Kennedy's remark that in the framework of Atlantic partnership we must allow the forces of competition to develop new patterns of trade. "Trade as free, as fair, and as flourishing as possible"—that is the motto under which our young Community will carry out the negotiations. Both sides are agreed that the trade we are endeavoring to expand must be competitive. This involves the task of preventing restrictions and distortions of competition in the framework of the Atlantic partnership as we are doing in the Common Market.

Within the EEC, where internal quotas have already been completely abolished and internal customs duties reduced by 50 percent, what we call competition policy has been a political topic of the foremost urgency for years. I am very anxious to make clear in my introductory remarks the part which competition policy plays in EEC and why this policy must be very much more comprehensive than what you understand by antitrust policy.

I hope that our talk will help to bring out the chief differences of method between your antitrust policy and ours and to make clear the viewpoint from which European antitrust policy must be considered.

In the first 4 years of building up the EEC our efforts were concentrated on establishing free movement of persons, goods, services, and capital within the Community. These aims have not yet been achieved, but we have advanced more rapidly than we dared hope at the beginning and have reached a point from which we will cover more or less automatically the remainder of the road to a complete customs union. The introduction of this customs union is leading to a considerable increase in trade between the member states. However, it does not guarantee that this trade is carried on fairly, and even less does it guarantee the optimum use of the Community's full economic potential.

For this reason we moved, somewhat more than a year ago, from the customs union to the economic union: with this, the main emphasis of our activity shifted to the development of a common economic policy. If we wish to keep the customs union viable we must evolve common agricultural, transport, and energy policies, common currency and development policies and, particularly, take early measures to establish a common policy on competition. Competition policy is therefore only one aspect of the common European economic policy. But it is of basic importance for the success of our economic Community.

Four reasons may be mentioned for this

In the place of the quotas and customs duties that have been dismantled it is possible to erect other obstacles to trade. This can be done through laws and regulations in the member states, through arrangements between enterprises which restrict competition and improper use by enterprises of a dominant position in the market. The first task of competition policy is therefore to insure that the positive effects of the customs union are not neutralized by state or private measures.

Secondly, the Community must also act against distortions of competition. Fair trade can only develop when the member states and enterprises are not

permitted to distort the conditions of competition in the Common Market. Equality of opportunity is not merely a question of justice; without it we should never attain a division of labor based on capacity. State aids, tax laws, and other statutory provisions can have as adverse an effect on this indispensable equality of opportunity as agreements or practices on the part of enterprises which lead to restraints of competition.

Thirdly, competition policy must see to it that competition is the decisive regulator of economic activity in the Community. We are at one with you in thinking that competition guarantees the optimum coordination of the individual economic plans of producers, traders, and consumers, and that freedom of choice is immensely more fruitful than the principle of direction by the state.

Fourthly, in all member states freedom of economic activity for all who form part of the market is felt to be a necessary corollary of a free society. An economy based on competition offers the highest degree of personal freedom.

These functions of European competition policy—the part it plays in building up and safeguarding the customs union, the assurance of equal opportunity, and the maintenance of the economic and political ideal of freedom—make clear why the EEC's competition policy has to be much more comprehensive than American antitrust policy. This policy comes into play at every point where action by governments or enterprises limits or distorts competition. The provisions in the treaty—they appear in the form of common rules at the beginning of the part dealing with the Community's policy—therefore, cover not only the prohibition of agreements and practices limiting and distorting competition and of the abuse of dominant positions, but also dumping, state aids, taxes, and the approximation of member states' laws and regulations. Thus they govern the conduct of member states and enterprises.

This does not, however, exhaust the subject of competition policy, which must further insure that action under the Community's other policies, such as energy policy or regional and structural policy, shall as far as possible be in accordance with the principles of competition.

You will be able to measure for yourselves the tasks which await us in these fields once you have obtained a picture of how legislation varies from one member state to another. You will also note that not all member countries are equally competition minded. We have found in practice that these difficulties are not insuperable; but when judging the measures we take you must allow for the fact that our markets have not yet merged into a single market such as exists in the United States.

There is, however, a second difficulty. Because of the interdependence of all economic policy measures and the differing situation in the member states we must as far as possible avoid using the individual instruments of competition policy in isolation but must take into account the whole gamut of possibilities and effects.

Before I come to antitrust policy in the narrower sense I would like to indicate briefly what measures taken by the member states are the subject of the Community's competition policy.

The treaty states that any aid granted by a member state which distorts competition and adversely affects trade between member states is incompatible with the Common Market. There are exceptions to this basic prohibition, some statutorily defined, others in which the Commission must examine, on the merits of each case, whether they are permissible under the criteria of the treaty. This second group consists especially of aids for the development of particular economic branches or areas. The Commission has scrutinized a great number of such aids from the competition angle. In doing this it seeks to insure that such aids shall as far as possible be selective, degressive, and limited in time, and that they shall not give the enterprises aided a competitive advantage over those which do not receive aid.

The Commission has carried out an inventory of existing aids. These are examined systematically from the angle of their compatibility with the treaty. Many aids, of the most varied forms, have already been abolished at the instigation of the Commission. They include direct financial aids, low-interest credits and tax reliefs. As regards the granting of future aids, which have to be reported to the Commission in good time, the difficulty lies in estimating the effect they will have on conditions of competition.

The second important aspect of competition policy is found in the fiscal provisions of the treaty. The purpose of these is to prevent the advantages arising from abolition of state obstacles to trade being canceled out by fiscal measures

with equivalent effect. They also combat distortions of competition which could arise from discrimination against imports, preferential treatment for exports, and a variety of other tax measures.

In the field of indirect taxes, taxation of imports and tax reliefs for exports lead to distortions of competition and abuses if, owing to the type of turnover tax system in force, the amounts of tax are not worked out exactly but based on average rates. This is the case in five of the six member states. For this reason the Commission has for years been paying special attention to the problems of harmonizing turnover tax. From its studies has emerged the draft for a directive to be sent to the Governments of the member states. This directive has two aims: in the first phase, all the member states would adopt a turnover tax system which—like the French added value tax—would make it possible to calculate the amount of turnover tax exactly, and so to avoid discrimination against imports and favoring of exports; it also helps enterprises with their head office outside EEC, since the tax treatment of imports and exports does not rest on a discriminatory basis. In the second phase a uniform turnover tax system is to be established and a sufficiently comprehensive alinement of tax rates undertaken to make it possible to do completely without tax refunds and countervailing charges on imports. We confidently hope that we will be able to attain the first of these aims soon and the second in the not too distant future, since conditions approximating to those of an internal market exists only if tax frontiers are also abolished.

In the field of direct taxation the Commission has long been examining with experts from the member states how far uniform or harmonized rules on assessment or depreciation and other important elements in calculating the actual tax charged are necessary. A committee of technical experts, in which American specialists have also had their say, has drawn up for the Commission a detailed account of the effects of differing tax systems on the process of integration.

The Commission realizes that the necessary changes in the tax legislation of the member states can be introduced only step by step and pari passu with the gradual development of the Common Market. Complete unification of the systems used in the various countries of the Community is not necessary; the example of the United States itself teaches us that it is possible to live in an internal market with differing taxes.

The aim of the approximation of laws, the third important aspect of European competition policy, is to eliminate those differences in national laws and administrative rules which decisively hinder the circulation of goods or distort conditions of competition. We can speak of a unified economic area only if a given product can be sold throughout the area without having to be altered. If, for instance, a producer must observe a different law on permitted food additives or technical security requirement in each member state, mass production on an economic basis becomes impossible. At present many differing laws and administrative rules continue to hinder the free flow of goods and services across the frontiers of the member states.

I will not mention all the measures which the Commission has already taken or is preparing in the field of approximation of laws. They range from the laws governing the letting of public contracts to legislation on foods and veterinary matters. Legislation against unfair competition, company law, bankruptcy law, the law on execution and protective laws of various kinds are further legal provinces in which harmonization work has started. This is a wide field in which rapid results are not to be expected. After all 30 years elapsed in Germany between the foundation of the Reich and the establishment of a unified code of civil law. As the necessary approximation of law cannot be obtained in all fields by means of directives to the member states, the Commission is at the same time initiating and encouraging the conclusion of European conventions. An example of such work on legal integration is provided by the work on a European body of law on patents and trademarks.

The draft which has been prepared by experts from the Commission and the member states for a convention which would bring in a European patent has already been published. We hope that this convention will be signed by the middle of 1964. I hardly need to describe the advantages which will flow from a European patent. Although the applicant will be free to choose to apply either for a European patent or for a national patent in each member state, we expect that the European patent will exert a great power of attraction, and this not only because it will simplify things but because of the high degree of protection envisaged. According to the draft the patentee holding a final European patent will have full patent protection throughout the territory of the Common Market.

The fourth aspect of competition policy, antitrust policy in the narrower sense, is the subject of your particular interest. I certainly do not need to explain to you the basic lines of articles 85 and 86 of the treaty for you will be familiar with them. Sine the first implementing regulation to this prohibition came into force on March 13. 1962. it has become clear that European antitrust law will not remain a dead letter. The publication of regulation No. 17 is a milestone in the development of European competition policy. It embodies not only a great measure of unity in our ideas on competition policy, but also the will to implement the prohibitions effectively.

The fact that these regulations are addressed directly to the enterprises and must therefore be observed without the need for any prior decision by the Commission or other authority is of fundamental importance. The validity of this principle of direct effect introduced by regulation No. 17 has meanwhile been confirmed by the European Court of Justice. What we have therefore is not legislation dealing with abuses but with legislation embodying certain prohibitions. Anyone who infringes these prohibitions runs the risk of painfully high fines and the other civil law consequences with which article 85(2) and the civil laws of each state threaten those who act in a manner prohibited by the law.

Alongside the Community's antitrust law the national antitrust laws continue to exist in the individual member states. This is sensible, since the treaty prohibitions extend only to practices liable to restrict trade between member states. The appreciation of any local restriction of competition or any abuse of a dominant position in the market therefore remains within the exclusive jurisdiction of municipal law. Of course, it can happen that both EEC legislation and domestic legislation claim applicability for the same case. In the United States you are quite familiar with this problem of the concurrent applicability of Federal and State laws. There are people in Europe who hold that enterprises must respect both fields of prohibition. the national and the international. In this connection the most important question seems to me to be that of the relationship of these laws to each other when under article 85(3) the Commission declares the prohibition in article 85(1) inapplicable but at the same time the relevant restriction on competition is forbidden by the cartel law of one or more member states. In practice no special difficulties are expected to arise from this, because the Commission always applies the exemption under article 85(3) in close cooperation with the competent authorities of the member states.

The prohibition in article 85 is also applicable to enterprises with their registered offices outside the Common Market if their conduct has effects on competition and freedom of economic activity in relation to the Common Market. This opinion is generally held, since what matters are the effects of restrictions on competition within the Common Market and not the place where such restrictions are initiated. Apparently business has also accepted this interpretation, since many enterprises with their offices outside the Common Market have reported such restrictive practices to the Commission. You know from all your own experience in the United States the problems of enforcement to which this can give rise.

Despite the many points of substance they have in common, the American and European antitrust laws are fundamentally different in one point. With your provisions on prohibitions are applied only through the courts, while with us the Commission can find that there has been an infringement and impose fines by decision. The Commission is not therefore in the position of a public prosecutor. Its function is much more to interpret the regulations objectively and to get at the facts of the case as they stand. True, it must not be forgotten that the Commission's decisions can be attacked in the European Court of Justice, which has an unrestricted right of review in respect of sanctions imposed by the Commission. All other decisions of the Commission can also be scrutinized by the Court of Justice to see whether the law has been properly applied and the action of the Commission was not ultra vires.

There are certainly many points of view which could be elicited for and against our two systems. The primary jurisdiction of an administrative authority for legal decisions in economic matters is thoroughly in keeping with a European tradition. It has indisputable advantages in cases where a purely juridical approach would not give the desired result. I have already spoken of how our cartel policy is embedded in general economic policy. This calls for the assessment of economic and legal points which cannot in the ordinary course of events be expected of the normal judge. The criteria of judgment in article 85(3), the provision which in a way incorporates our "rule of reason," show this

very clearly. This is why regulation No. 17 places jurisdiction for the application of article 85(3) exclusively in the hands of the Commission, subject, of course, to review by the Court of Justice.

However, with us too there can be no doubt that the civil courts of the member states—apart from the case of exemptions granted under article 85(3)—have full power to apply articles 85 and 86. They decide on all consequences in civil law of an infringement of the prohibitions; i.e., on the nullity of prohibited agreements and on claims for damages or on cease-and-desist actions. They may submit to the European Court of Justice for preliminary decision questions on the interpretation of articles 85 and 86, as happened in the *Bosch* case. In its decision on this case the Court of Justice required article 85 to be considered in full. This means in practice that a civil court can draw no conclusions in civil law from an infringement of article 85(1) if there is still a possibility of article 85(3) being applied by the Commission.

It may be foreign to your way of thinking for the application of our rule of reason (article 85(3)) to be dependent on the Commission being notified in good time. That at any rate is the rule, and regulation No. 17 departs only in connection with a number of the more innocuous restrictions on competition. As you know, the notification system was a matter of dispute with us also. It was finally accepted mainly on grounds of tradition and in keeping with the idea of preventive control. It certainly has one important advantage for business, in that it provides far-reaching security for the enterprises notifying. In the case of cartels which were in existence before regulation No. 17 was enacted, the system had the further advantage that for agreements notified in good time a transitional ruling could be given.

From the outset, business showed great interest in the treaty prohibition on cartels. Enterprises endeavored, in innumerable contacts with the appropriate offices of the Commission, to obtain the clearest possible picture about the interpretation of article 85(1) before the notification period expired. We welcomed this and provided information wherever possible, but we also emphasized often enough that we have little use for abstract endeavors at interpretation and wish to develop a doctrine gradually as we deal with individual cases. Even before the period of notification had run out, however, the Commission, in an endeavor to avoid a multitude of unnecessary notifications, announced the types of exclusive dealing agreements and licensing arrangements which did not, in its opinion, fall under article 85(1). A guide was issued to give enterprises an idea of the new law.

We were able to observe with satisfaction that there was no boycott of the notification system. On the contrary more than 35,000 notifications have so far come in; the number of agreements thus notified is naturally much higher; 90 percent of the notifications concern "old" cartels. More than 11,500 firms have made use of a simplified form of notification which the Commission provided for certain types of exclusive dealing agreements. If we add restrictive practices which have been discontinued without notification—and their number is probably fairly large—it can be stated that by and large business has observed the prohibition on cartels. We are, of course, aware that many forbidden restrictive practices have not been notified. For this reason the Commission is determined not to limit its activity to dealing with the cases notified but to devote a good part of its efforts to dealing with complaints and uncovering infringements.

The great number of notifications provide the Commission with an excellent general picture of existing restrictions of competition. Naturally their number also means an enormous amount of work. Since the notification periods ran out only a short time ago, I cannot yet tell you today what plan the Commission will work out to handle this mass problem. First of all there is the possibility under article 85(3) of issuing declarations of nonapplicability covering certain types of agreement, decision, or concerted practice. This could, of course, be envisaged for those cases which can be grouped by type; i.e., more or less those which could be notified on the simplified form B–1. Secondly, we will use the methods of test cases, that is decide with priority on those cases in the group of vertical and horizontal restrictions of competition which in our opinion are so typical that they will help the business world to arrive at an early understanding of our general line of interpretation.

As for the prohibition on the abuse of dominant positions in the Common Market (art. 86), we will certainly have to deal with a negative problem of volume, since only an occasional case of abuse becomes known through complaints. However, the Commission is determined to pay great attention to this

field also. In order to uncover infringements it will in particular make use of the provision concerning the investigation of economic branches contained in regulation No. 17. As you know, the treaty does not forbid domination of a market in itself. However, the question of what possibilities article 86 opens in relation to mergers of enterprises which lead to a dominant position in one or several markets is being carefully examined.

As the Commission explained in its action program of October 1962, it cannot simply watch to see that enterprises holding dominating positions do not abuse these. It feels that the need is much more to avoid giving further artificial encouragement, through the provisions of fiscal or company law and the like, to concentrations of enterprises which are not justified in terms of the national economy. The problem of concentration is attracting great interest throughout Europe, and lively exchanges of views on the point are going on between Governments, Parliaments, and the European institutions. Of course, our thoughts on this subject are necessarily still in the early stages and we will doubtless learn much from American experience. The creation of a larger market in Europe inevitably leads to economic concentrations; our task is to see that competition is maintained.

The economic policy chapter of the action program just referred to speaks of the Commission's intention of laying proposals for a "longer term perspective" before the Council of Ministers. We are often asked—and this is the last point I would like to deal with in this introduction—how this intention dovetails with the role we attribute to competition in the execution of community policy. The answer to this is really to be found in a careful study of the action program itself. Nowhere in the program is it said that we intend to interfere with the freedom of decision of enterprises or want to regiment the economic process in any other way. What we want—but what, however, still requires to be agreed with the member states and filled out in detail—is a longer term forecast so that, as we say in our program, national policies can form a coherent whole with each other and with the various community measures. So far each member state has carried on its own economic policy. It is our concern to coordinate these disconnected policies and dovetail them into a community framework, a process which, of course, can only succeed if the community as a whole knows what economic policy it wishes to follow.

If you read the explanations of the longer term forecast in the action program you will find that it says nothing about the behavior of enterprises. Naturally they too will be able to profit by such a longer term forecast. However, the forecast is conceived primarily as an instrument for coordinating overall economic policy measures and especially for influencing the use of the public resources which the member states expend every year for particular purposes. No well-governed state today fails to make a plan for its income and expenditure; they all take probable future requirements into account when devising their agricultural, transport, or energy policies. After all, every political action by a government is basically a piece of work to be fitted into a larger mosaic. The aim of the longer term forecast is to make it easier for such a picture, which each member state has hitherto sketched out for itself, to be produced for the whole community. Nobody has any intention of recommending, even less of laying down beforehand, norms for investments or production in individual branches of the economy, let alone for individual enterprises.

There is something about certain words which make it sufficient simply to mention them for the champions of opposing ideologies to gird themselves for combat. "Programing" seems unfortunately to be one of these words. However, if we do not read more into that part of the action program which deals with longer term forecasts than it really says, we will find confirmation of my remarks about the Commission's intentions and certainly nothing conflicting with my earlier statement that competition is to play a decisive part in the economy process in our community. On the contrary, the longer term forecast may even make it possible for us to stimulate competition, by helping us to find and apply suitable means to rekindle it wherever it threatens to disappear.

I hope that in speaking to you, the traditional pioneers of the idea of competition, I have not said too many things that are obvious and that I have been able to give you an impression of the manifold tasks which await us if we are to attain a goal which is fixed for us in article 3 of the treaty: To establish a system insuring that competition shall not be distorted in the Common Market and that it shall serve to steer and safeguard our free economic order. I consider it a happy circumstance that I have this chance, shortly before my trip to the United States, to welcome you for talks about our competition policy. I am convinced that your work will help to strengthen the links forged within the Atlantic partnership.

I. Common Market Antitrust Developments

A. BASIC POLICY ISSUES

1. Registration and regulation 17 [1]

Some observers believe the requirement that one register all agreements for which exemption under article 85(3) of the Rome Treaty is sought had already achieved some very useful results. Businessmen had been made aware of antitrust to an extent that might not otherwise have been possible; many had reexamined their agreements and modified a good number. The registration procedure thus served as a method of self-enforcement. It was also pointed out that the requirement that one register to obtain an exemption compelled the companies and not the Commission to take the first step to bring the agreements before the Commission. Otherwise, many companies would simply have sat back and waited. This factor, however, also led to criticism by some who complained that the procedure forced companies to incriminate themselves and to present economic arguments in attempted justification without, as yet, any idea of the legal standards that will be applied.

Other observers criticized the registration procedure as excessively formalistic and cumbersome. The fact that some 36,000 agreements had been filed, all of which had to be examined by a relatively small Commission staff, was cited by some as proof that the registration process set out by regulation 17 was a mistaken approach because the Commission would be unable to cope with the mass of paper; others, however, felt the Commission would be able to handle the volume. Another observer commented that regulation 17 had transformed article 85 from the prohibition to the abuse principle because so many of the agreements which might be illegal under article 85(1) would not be prohibited, as a practical matter, until their application for exemption under article 85(3) was denied. To others, this appeared as a virtue because it was more in line with traditional European concepts of control and regulation, and provided an opportunity for individualized interim treatment where appropriate.

2. "Planning" and competition

"Planning" was said by some not to be inconsistent with competition if the "planning" was merely indicative and not coercive. On the Common Market level, a better term would be "forecasting" or "programing." It did not go very deep into the economy but was limited to forecasting, to determining the area of Government investment and to providing the economy with knowledge. One private observer noted the possibility that exemptions under article 85(3)

[1] Under regulation 17, which went into effect on Mar. 13, 1962, all agreements within the scope of article 85(1) of the Rome Treaty are prohibited unless exempt under article 85(3). In order to obtain such an exemption, it is necessary to register the agreement with the Commission.

might be used to further the objectives involved in any "planning" the Commission might engage in.

Others noted that whereas German Economics Minister Ludwig Erhard had challenged the Commission in Strasbourg last year for the latter's inclusion of such "programing" in its action program, almost all the other countries were agreed that some form of overall Common Market forecasting was necessary. It was suggested at one point that Professor Erhard's opposition was primarily for home consumption and that, as a practical matter, the Germans had agreed to a very substantial amount of programing procedures.

In any event, Common Market programing or forecasting was not likely to be as deep as the national variety, but would probably be limited to very broad general areas and need not conflict with antitrust policies.

Some observers, however, felt that planning and competition were inconsistent, at least in theory. It was also said that some member states, such as France and Italy, did not value competition as highly as others, but were more interested in coordination and integration; France, indeed, was encouraging concentration through merger. Others denied these differences and asserted that competition was now generally accepted throughout the Community and that the French were as interested in maintaining competition as anyone else. While admitting the possibility of a logical inconsistency between planning and competition, these observers stressed that the two were compatible in practice because planning could easily leave almost everything to individual initiative and could be largely indicative. It was also said by these people that effective competition requires adequate knowledge of market conditions, and programing sought to provide such information.

Others, however, noted that indications, if specific enough, can facilitate noncompetitive conduct. Further, that planning is inherently hostile to free foreign trade for uncontrolled foreign imports can upset the plan.

3. Concentration

Some expressed the view that many small, inefficient, and heretofore sheltered firms would disappear. This was not generally considered to be unfortunate because European industry in many areas was too fragmented. For this reason, the French plan encouraged further concentration. Other observers, however, viewed the movement to concentration with apprehension. According to one observer, this feeling was rather strong in England where there was a concern that the small man was being squeezed out and that many mergers were not in the public interest.

One observer commented that the abolition of restrictive practices could induce mergers, but this view was challenged by another who argued that there was no causal relationship between a reduction of cartels and an increase in mergers. For one thing, cartels are entered into for economic reasons which are often quite different from those inducing a merger; secondly, experience in Germany during the 1920's showed that cartels and mergers generally flourished simultaneously and that cartelization itself is a vigorous stimulant to a merger movement.

The Rome Treaty does not seek to prevent or prohibit the existence of dominant positions but only abuses by one or more firms having a dominant position (article 86). One observer interpreted this as reflecting an unwillingness to fight the power of big business and a bias against the small. Another, however, pointed to the potentially wide applications of article 86, but stressed that these were only theoretical and that much would depend on the amount of power the Commission would be able to exercise.

B. ADMINISTRATION AND OPERATION

In November 1962 and February 1963, some 36,000 agreements were submitted to the Commission for exemption under article 85 (3) and regulation 17. These have presented the Commission with a serious physical problem for each must be passed on. One observer noted that this problem is compounded by the fact that all nine members of the Commission must participate in each decision and this, when added to the multitude of other tasks facing the Commission in this and other areas, presents great physical problems.

Some of the notifications may be dealt with on an overall basis by means of general rulings. Others may be disposed of by virtue of rulings in some major test cases.

One observer declared it undeniable that many restrictive agreements still existed in Europe. It was generally agreed that many agreements which fall under article 85(1) and are illegal unless granted exemption under article 85(3), were not submitted for exemption. This is in part, at least, because some firms were willing to take the chance that (*a*) their agreement would not be held to be within the as yet uncertain scope of 85(1); and (*b*) it would take the Commission a long time to catch up with them. It was, therefore, felt by some that the Commission would have to take action against such agreements soon, so that those who did not register would not wind up in a better position than those who did comply. It was also felt by some that it was important for the Commission to take decisive action in the near future—the treaty has been in effect since 1958 and so far, no decision has yet been taken against any restrictive agreements or practices.

It was also generally agreed that the Commission's main impact so far has been on vertical agreements such as exclusive distributorships which might serve to divide up territories. Lawyers generally declared that they had had almost no experience with horizontal agreements; one lawyer stated, however, that because the Commission might consider agreements between parent and subsidiary corporations to be within the scope of article 85(1) of the treaty, some companies were thinking of operating primarily through branches. Unified patent and trademark laws would facilitate this development.

The focus on vertical arrangements was explained by one observer to result in part from the fact that most exclusive distributorships seem to delimit the area of exclusivity to national areas, thus serving as substitutes for the quota and tariff barriers to be abolished.

Article 85(1) must reach at least such arrangements if it is to prevent the substitution of private for public restraints.

It was further pointed out by one nonofficial observer that regulation 17 deals largely with the civil law consequences of restrictive agreements for nonregistered agreements are legally unenforcible. Such consequences relate primarily to vertical arrangements, since horizontal arrangements generally do not rely on civil enforcement whereas vertical arrangements generally do. Thus, according to this observer, the Commission is relying heavily on private action to enforce article 85, insofar as regulation 17 was concerned.

One of the major areas of impact, according to some, was in the domestic law of the member states, where treaty provisions like articles 85 and 86 are considered as part of the domestic law. In several suits to date, article 85(1) of the treaty has been invoked as a defense to a suit by an exclusive distributor against a third party who sold in the former's territory. One French court has referred the antitrust question to the Commission in Brussels because one of the parties applied to Brussels for an exemption under article 85(3). Such a reference to Brussels was said to be possible in almost every lawsuit involving a substantial amount of commerce since almost every such agreement or arrangement may affect commerce among the member states. This can result in a great deal of extended litigation.

According to one observer, there has so far been no discernible pattern of how the courts will enforce the treaty. Some national courts have ignored it while others have taken full account of it and deferred to the Commission.

C. ATTITUDES TO COMPETITION IN EUROPE

It was generally felt that one of the major tasks of the Commission is to spread awareness of the antitrust laws among European business and public opinion. Although there were a few who felt that antitrust in Europe was a sham and would never be taken very seriously by business, all observers felt that the registration process had made most substantial business firms very conscious of the antitrust laws and most felt that business takes antitrust quite seriously now. One observer commented that American business enterprise and lawyers who are used to thinking of antitrust problems have communicated this consciousness to their European counterparts.

This awareness has also resulted from a greater interest in competition in Europe since 1958, when the Rome Treaty went into effect. Many cited the French as an example of this: When the Rome Treaty first went into force, many French businessmen were extremely apprehensive because French tradition is largely protectionist. French businessmen saw, however, that they were able to compete quite profitably, and this has made them less averse to competition.

Businessmen, lawyers, officials, and experts from all countries almost unanimously declared that competition was basically a good thing. Many, however, had qualifications as to how much competition is appropriate at various times and places and how such competition should be enforced.

Public opinion has also become somewhat more competition-minded although the average man still seems unaware of all of the implica-

tions of antitrust. One observer felt that the Commission lacked any real public support for its efforts in this area although this same observer agreed with another who commented that consumers are becoming more price conscious and interested in competition. It was pointed out that consumers organizations are being formed and some had joined in a Common Market-wide federation, although consumer groups were still a nascent phenomenon.

The trade unions and Socialists were said to be very interested in antitrust enforcement although some observers noted that the Socialists, both in the Common Market and England, seem to prefer more direct forms of control by means of partial or full ownership, or more specific planning.

D. SPECIFIC PROBLEMS

1. Interstate commerce

One of the most significant initial problems before the Commission is the scope of the article 85(1) jurisdictional phrase "likely to affect trade between member states." It was agreed by the two observers with whom the issue was discussed [2] that initially, at least, the phrase will not be interpreted as broadly as the correlative concept in American antitrust jurisprudence. One of these observers thought that for the present, the Commission would include only those practices which actually and directly affect trade between member states and not those which have an indirect effect. The other observer commented that the scope of this concept will probably depend directly on the degree of power the Commission is able to develop.

2. Rule of reason

A few commentators claim that a rule of reason is incorporated in article 85(1) because the Dutch version of the text prohibits restraints "adversely affecting" commerce. However, the majority view was said to be that if there is a rule of reason, it is only in article 85(3), and not in 85(1).

3. Private suits by injured parties

The Rome Treaty has no provision for suits by private parties injured by restrictive agreements, but the domestic law in the member states does give a right to damages for a violation of law. It was pointed out, however, that the German law only allows a right of recovery to those in the specific class expressly intended to be protected by the statute and, to this observer, article 85(1) did not seem to be such a statute. Another observer thought that some agreements prohibited by 85(1) might be held to give rise to a private damage suit. French law apparently grants a right of recovery to anyone damaged by any unlawful act. In both countries, this point is still to be decided.

4. Definition of "enterprise"

One observer stressed the present uncertainty over whether each separate corporation in an affiliated corporate group was an "enterprise" within the meaning of the Rome Treaty. If so, this meant that contracts between affiliated corporations would be prohibited

[2] Neither of these was on the Commission or its staff.

by article 85(1). Uncertainty about this question, together with the general development of a single European patent and trademark system, rather than six separate systems, is encouraging a tendency to unify all the various corporate enterprises within the Common Market into one and to operate through branches.

5. Exclusions

One lawyer declared that the scope of a statement by the Commission on December 24, 1962, on the reach of article 85(1) with respect to patent licenses was quite uncertain. Under this statement, article 85(1) is not applicable to the exercise of rights within the patent grant established by national law, but national laws vary.

6. Interplay of national and Common Market laws

One non-Commission observer expressed the view that if national law is stricter than the Rome Treaty, the national authorities are likely to prohibit the practice involved even if the Commission had granted it an exemption. This is because an article 85(3) exemption applies only to the prohibitions imposed by 85(1) and not to prohibitions based on other laws.

II. National Laws [3]

A. GERMANY

German law consists primarily of a prohibition of cartels with exemptions for certain cartels under specified circumstances. The latter include such arrangements as export, import, and rebate cartels, among others. The nature and terms of all such exempt cartels, except export cartels which do not affect the domestic market, are published in the Official Gazette.

Some of these cartels, though exempt under German law, had dissolved soon after formation, because of economic conditions. It was also pointed out that some of the export cartels, though exempt under German law, might have to be abandoned, because they affect commerce with other Common Market countries and are therefore prohibited by article 85(1).

The law was pushed through by Economics Minister Ludwig Erhard over the strong opposition of German industry. It is administered by a staff in the Bundeskartellamt (BKA) stationed in Berlin consisting of some 80 lawyers, economists, and investigators and about 105 others. The BKA has extensive investigative powers, and can examine files on business premises. Decisions are made by sections called decision departments. Appeal from decisions of the BKA are to sections of the regular courts which have special competence in anticartel law. In addition, there have been some private suits but these have focussed primarily on resale price maintenance. The law contains almost no significant power against mergers.

So far, the law has had some effect, although the improvement in competition since 1958, when the law became effective, has not been extensive. It has not affected the structure of the German economy, but many restrictions have been prevented or removed.

[3] As noted above, the information in this section, as in all others, was obtained from numerous sources, both private and official, American and European.

There still is opposition to the law among most German industry and industry organizations but the younger businessmen, particularly in commerce, as well as certain important industry groups, are much more competition-minded. The BKA was considered to be not overly popular with the industrial business community.

One observer concluded that the German antitrust law had not adversely affected American investment in Germany. It was said that American business can operate in Germany without joining cartels.

One observer stressed that the most important effect of the law was on judicial and public opinion. This observer felt that the courts were becoming much stricter in enforcing the prohibitory section of the law. Another observer noted the large volume of complaints from businessmen received by the BKA, most of which deal with discrimination and refusals to sell. Many such complaints are withdrawn because the alleged offending parties discontinue the conduct complained of. So far, only one fine has been imposed.

Public opinion is becoming more price conscious and there is a tendency to identify cartels with exploitation. Nevertheless, the general public still has rather fuzzy ideas about competition.

It was pointed out by another person that the Socialist Party in Germany has become interested in antitrust. There is now a basic agreement among all the parties that antitrust policy should be continued and developed.

On the other hand, it was noted that there has been a concentration movement in Germany. A factfinding study by the Economics Ministry on the factors making for concentration and its effects is currently underway. Economists in Germany seem agreed that this movement should not be encouraged by tax or other laws and the Government is not promoting mergers or other forms of concentration. Concentration in Germany was said by one observer to be a political issue, although there was still no great public interest in the matter.

B. FRANCE

France has a law against agreements (ententes) which, however, are permitted if a Commission finds them in the public interest. The Commission, which includes representatives from Government, business and labor, makes a full investigation, consults with the companies affected, and then makes a recommendation to the Minister. The latter then recommends to the parties and this recommendation has usually been accepted.

One nonofficial observer described French law as very limited because it focusses on price and deals with restraints only as they affect price. The recent law, which is very strict toward such vertical arrangements as resale price maintenance, exclusive dealing and refusals to sell, was aimed at abuses by small businessmen during black market days immediately after the war. Nevertheless, one observer stated that French antitrust law has been enforced with increasing vigor in the last 5 years. This has been accompanied by a growing acceptance of competition among the French business community as a result of competitive success in the Common Market.

There were substantial differences of opinion on whether the French planning system was consistent with competition. Some felt that the combination of (1) consultation with industry, and (2) governmental power over credit, was inconsistent with a vigorously competitive economy. It was also pointed out that the plan encouraged mergers, in order to reduce the number of firms in what was generally considered an extremely fragmented economy. Those who held this view also felt that the French were not as interested in competition as some of the other nations.

Others, however, asserted that the inconsistency was more theoretical than actual. It was admitted that the plan contemplated incentives and discouragements with respects to investments. However, it was stressed that competition, to avoid the danger of being blind competition, requires information of the proposed goals and objectives. Although there is an attempt to avoid a waste of capital, no sanctions or penalties are imposed, nor is there any attempt to keep small, inefficient industries operating at high prices and sheltered from competition. It was stressed that no individual firms were given any specific suggestions.

C. GREAT BRITAIN

The English antitrust law, passed originally in 1948, and amended substantially in 1956, provides for relatively strict control over restrictive agreements but still achieves very little control over monopolies, which are defined as possessing 33⅓ percent of the market.[4] One observer felt that when the Restrictive Practices Act of 1956 first went into effect, it had a great impact on eliminating many restrictive agreements. Recently, however, many gentlemen's agreements have developed and the law has not been able to cope effectively with these.

Very heavily concentrated industries are not uncommon in Great Britain; these include drop forgings and oxygen.

It was generally agreed that the Government required much greater power to control mergers and increasing concentration and that the present law was wholly unsatisfactory. There had been a great deal of public concern about an attempt in early 1962, by Imperial Chemical Industries (ICI), one of the world's largest chemical companies, to take over control of the very large textile concern, Courtaulds, Ltd., with which it competed in synthetic fibers.

The attempt had failed but it had caused much concern, and many other merger attempts had succeeded. A feeling was developing that the little man was being squeezed out. The fact that the Government had no power to prevent such mergers had induced the Conservative Party to establish a committee headed by Lord Poole to prepare a report with recommendations on the monopoly problem.[5] The mem-

[4] The present law provides that the Board of Trade, which is somewhat analogous to the U.S. Department of Commerce, may order an investigation by a Monopolies Commission whenever certain dominant positions exist with respect to the supply of goods. The Commission thereupon reports and recommends to the Board of Trade with respect to the facts and the public interest. The Board of Trade may adopt or ignore these recommendations; if the former, it may consult with the businesses concerned to obtain voluntary compliance with the recommendations. It has the power to issue an order, but so far, has not had to do so. Relatively few industry reports have issued, and in at least one case, the Board of Trade refused to adopt the Commission's recommendations.

[5] The full report will be published by the subcommittee in the near future. The conclusions and recommendations of the report are reprinted in appendix C to this summary.

bers of the committee first dealt with the basic question of whether monopolies were harmful or beneficial. It was concluded that whereas monopoly was sometimes beneficial, especially with respect to research and exports in some industries, the benefits did not usually outweigh the detriments, and the Government should have more power to control monopoly. It was also concluded that the Government had to be in a position to prevent mergers for there was little it could do once the merger had gone through, even if the merger resulted in monopoly. At present, the Government would have to introduce special legislation for each special case, a difficult and cumbersome task.

The report, published in March 1963, calls for premerger notification and approval by a special registrar and monopolies commission of all mergers where one of the companies has £1 million ($2,800,000) in assets or where the merged company has £1½ million ($4,200,000) in assets. The registrar then decides whether the merger will, in fact, result in a dominant position; if so, then the commission decides whether the merger "is, on balance, calculated to bring gains to the public interest, not obtainable in other ways, sufficient to outweigh the public interest in maintaining competition." [6] Until this decision is made, the merger cannot go through. Even if the merger is approved, the Government would still retain power to call for periodic reports, to impose price controls, and to order divestiture, if appropriate.

The report had been very favorably received by the press, although the general public was not very much aware of antitrust. There was no unfavorable comment from industry. The Labor Party seemed generally in agreement with the recommendations for premerger controls but, according to one observer, would have gone further in calling for nationalization or governmental membership on the board of directors, where appropriate. One observer noted that some members of the Labor Party were less interested in preventing mergers and more concerned that English companies should be large enough to compete efficiently and effectively in world markets in mass production items where costs of research and development are heavy.

It was stressed that the proposed procedure was to be purely administrative and not judicial. In contrast with the United States, English tradition would not permit the courts to handle what the British consider essentially political problems.

The proposals in the report were unlikely to be followed in detail in any Government legislation, since the report represented only the views of one group within one party. Some observers believed the prospect of a general election would delay legislation on this topic because it would take time to draft appropriate legislation. There was, however, a good chance that some legislation, perhaps along the lines of the report, might be put through at some stage, since both parties seemed agreed that some premerger controls were necessary.

It was also noted by one observer that recommendations by the National Economic Development Council (NEDC), the British planning authority, might play an important role in the fate of possible merger legislation.

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[6] "Monopoly and the Public Interest," p. 35.

III. Implications for American Interests

It was generally agreed that American firms would have little difficulty working with the new European antitrust laws since American firms were used to antitrust laws.

Some lawyers felt that the operation of the European antitrust laws had not yet induced any change in the operations of the U.S. firms in Europe. Others said that many arrangements had been changed and that more such changes could be expected, especially with respect to restrictions on exports which were said to be very common in vertical arrangements.

One lawyer commented that American businessmen were somewhat concerned about the differences between American and European antitrust laws but it was generally expected that this problem would diminish in time.

Some Americans stressed that the European antitrust laws would greatly help American businessmen. In many areas, it was said, Americans are the newcomers seeking to gain entry into markets which are often restricted and anything which loosened up these markets was beneficial. This view was shared by almost all the American lawyers with whom this point was discussed.

One American lawyer commented that many American firms which had agreed to grant exclusive distributorships to European importers were now pleased at the prospect that they might be able to terminate these arrangements. This was particularly true for those American businessmen who had entered into these arrangements years back when they were still manufacturing only in the United States. Now, many of these companies had opened manufacturing plants in Europe and no longer wanted or needed exclusive distributors.

Another observer noted, however, that the inability to grant an exclusive distributorship might make it more difficult to export from the United States to Europe.

The decision on whether a parent and subsidiary corporation are one enterprise or two, for purposes of article 85(1), might induce some American firms to restructure their European operations. Others pointed out that if the Commission rules that territorial restrictions in exclusive distributorships are illegal, then American firms may also have to restructure this phase of their operations.

One observer commented that export cartels, both American and foreign, were inconsistent with a truly liberal international economy, but noted that no country would unilaterally try to withdraw its exemption for such arrangements. Some interest was shown in the present study of the Webb-Pomerene Act referred to by Assistant Secretary of Commerce, Jack Behrman, on March 14, 1963, at the subcommittee hearings and in the different viewpoints expressed at that hearing.

It was also pointed out that if an American Webb-Pomerene export association affected trade among Common Market member states, it was subject to article 85, and if an exemption were desired, the association's agreement would have to be registered.

APPENDIX A

CHRONOLOGY OF VISIT AND LIST OF CONFERENCES

BRUSSELS, BELGIUM

April 15, 1963:

A.M.: Briefing by U.S. Embassy staff and John W. Tuthill, Ambassador to the U.S. Mission to the European Communities, and Mission staff, on economic and antitrust developments in Europe.

P.M.: Reception and dinner conference with American businessmen in Brussels, including:

ITT Europe, Inc., Brussels, Belgium:
Charles G. Sherwood, Executive Vice President;
David Barker, Area Director, Public Relations;
R. G. Bateson, Area General Counsel;
W. H. Bulte, Production Line Manager Components; and
H. P. Willard, Area Director, Planning and Organization.

Clark Equipment Company:
Martin E. Graham, General Manager.

INCOM:
Colonel Ralph J. Nunziato.

Management Center, Europe:
Nelson L. Rusk, Managing Director.

Arthur Anderson & Company:
George R. Stevens, General Manager.

First National City Bank:
Arthur L. Worthington, Manager; and also,

Robin International, Ltd., London, England:
Anthony Z. Landi.

April 16, 1963:

A.M.: Briefing by Ambassador Douglas MacArthur, II, on relevant political and economic factors in Europe and Belgium.

P.M.: Luncheon and conference with Hans von der Groeben, Commission Member European Economic Community, and antitrust experts on his staff as follows:

P. VerLoren van Themaat,
K. Gleichmann,
R. Jaume,
N. Koch,
G. Linssen,
P. Nasini,
W. Schlieder,
H. Schumacher,
I. Schwartz,
J. Thiesing, and
E. Wirsing.

April 17, 1963:

A.M.: Individual conferences with American lawyers in Brussels:
Klaus Newes, Attorney at Law, Baker, McKenzie & Hightower;
Frank Boas, Consulting Attorney.

Noon: Luncheon conference with American lawyers, and others, given by Ambassador John H. Tuthill. Guests included:
Homer Angelo, Attorney at Law;
Sydney Cone, III, Attorney at Law, Cleary, Gottlieb and Steen; and
R. Peter Dreyer, The Journal of Commerce.

P.M.: Conference with Professor Michel Waelbroeck, Institute of Comparative Law.

Reception given by American and European business and legal community in Brussels. Guests included:
Count Charles d'Ursel, Vice President and General Manager, Morgan Guaranty Trust Company of New York;

Edgerton Grant North, Vice President, Morgan Guaranty Trust Company of New York, and Consultant on EEC;
Thomas L. Coleman, Attorney at Law, Baker, McKenzie & Hightower;
Paul Eeckman, Area Counsel, Western European Area, Coca Cola Export Corporation;
Rene Lamy, Assistant to the Management, Societe Generale de Belgique;
Baron Charley del Marmol, Professor, Liege University;
Andrew W. G. Newburg, Attorney at Law, Cleary, Gottlieb, and Steen;
Robert Niemants, Counsellor, Federation of Belgian Industries;
Raymond Publinckx, Director and General Manager, Federation of Belgian Industries;
Pierre van der Rest, President, Steel Industry Association; and
Arnold van Zeeland, Brufina.

April 18, 1963:
A.M.: Individual conferences with:
Professor Eric Stein, Law School, University of Michigan and
Professor Ernst J. Mestmaecker, Adviser to EEC Commission, University of Munster.
P.M.: Press Conference at U.S. Mission to the European Communities.

PARIS, FRANCE

April 19, 1963:
A.M.: Briefing by U.S. Ambassador Charles E. Bohlen at U.S. Embassy.
Conferences with French antitrust authorities, including:
Phillippe Huet, Director-General, Office of Price and Economic Investigations, French Ministry of France and
Robert Clement, Director of Economic Investigations, French Ministry of Finance.
Noon: Luncheon with American lawyers, including:
Loftus Becker, Cahill, Gordon, Reindel & Ohl;
Professor Lazar Focsaneanu, Coudert Brothers;
A. Jack Keyorkian, Coudert Brothers;
George Martin, Donovan, Leisure, Newton & Irvine;
Richard Moore, Cleary, Gottlieb, and Steen; and
Charles Torem, Coudert Brothers.
P.M.: Conferences with French experts, including:
Professor Jacques Lassier and
Professor Robert Plaisant.

April 20, 1963:
A.M.: Conference with Dr. Gerhard Rauschenbach, Vice President, German Cartel Authority.

LONDON, ENGLAND

April 22, 1963:
A.M.: Briefing by U.S. Ambassador David K. E. Bruce at U.S. Embassy.
Conference with Lord Poole, Chairman of the Conservative Party Committee on Mergers and Monopolies, who was accompanied by his assistant, Mr. James Douglas.
Noon: Reception and luncheon at U.S. Embassy by Ambassador Bruce.
Included were:
Lord Poole and
Austen Albu, Member of Parliament (Labor)
P.M.: Conference with Mr. Austen Albu, M.P., on Labor Party views on antitrust and monopoly problems.

APPENDIX B

COMMON MARKET ANTITRUST LAWS

ROME TREATY

Article 85

(1) The following shall be deemed to be inconsistent with the Common Market and shall be prohibited, namely: all agreements between firms, all decisions by associations of firms and all concerted practices likely to affect

trade between member states and which have the object or effect of preventing, restraining or distorting competition within the Common Market, and in particular those which:

(*a*) directly or indirectly fix buying or selling prices or other trading terms,

(*b*) limit or control production, marketing, technical development or investments,

(*c*) effect the sharing of markets or sources of supply,

(*d*) apply to trade partners unequal conditions in respect of equivalent transactions, thereby placing them at a competitive disadvantage,

(*e*) make the conclusion of a contract subject to the acceptance by trade partners of additional goods or services which are not by their nature or by the custom of the trade related to the subject matter of such contract.

(2) Any agreement or decision prohibited by this Article shall be automatically null and void.

(3) The provisions of Clause 1 may nevertheless be declared inapplicable

—to any agreement or category of agreements between firms,

—to any decision or category of decisions of associations of firms or

—to any concerted practice or category of concerted practices

which contributes towards improving the production or distribution of goods or promoting technical or economic progress while reserving to users a fair share in the profit which results, without

(a) imposing upon the firms concerned any restriction which is not essential for the attainment of these objects, or

(b) giving such firms the power to eliminate competition in respect of a substantial portion of the products in question.

Article 86

It shall be inconsistent with the Common Market and prohibited so far as the trade between Member States may be thereby affected for one or more firms to abuse a dominant position in the Common Market or any substantial part thereof:

The following practices shall in particular be deemed to be an abuse:

a) the direct or indirect imposition of buying or selling prices or other unfair trading terms;

b) the limitation of production, marketing or technical development to the prejudice of consumers;

c) the application to trade partners of unequal conditions in respect of equivalent transactions, thereby placing them at a competitive disadvantage;

d) subjecting the conclusion of a contract to the acceptance by trade partners of additional goods or services which are not by their nature or by the custom of the trade related to the subject matter of such contract.

Article 87

(1) Within three years after the coming into force of this Treaty, the Council, by a unanimous vote on the proposal of the Commission and after consultation with the Assembly, shall make such regulations or directives as may be necessary for the application of the principles set out in Articles 85 and 86. If such measures have not been taken within the time limit specified, they shall be taken by the Council voting by a qualified majority on the proposal of the Commission and after consultation with the Assembly.

(2) The measures specified in paragraph 1 shall in particular be designed:

a) by the institution of fines and penalties, to enforce the prohibitions specified in Article 85(1) and Article 86,

b) to determine the procedure for the application of Article 85(3) in the light of the need to exercise effective supervision and to simplify administrative control so far as may be possible.

c) where appropriate, to specify the scope of the application of the provisions of Articles 85 and 86 in the various economic sectors,

d) to define the respective role of the Commission and the Court of Justice in the application of the provisions specified in this paragraph,

e) to define the relationship between national legislation and the provisions of this Section and those adopted under this article.

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Article 90

(1) Member States shall not in respect of public undertakings or undertakings to which they grant special or exclusive rights enact or maintain any measure contrary to the rules of this Treaty, and in particular to those contained in Article 7 and Articles 85 to 94 inclusive.

(2) Undertakings responsible for performing services of public utility or which have the character of a fiscal monopoly shall be subject to the rules of this Treaty and, in particular, to the rules of competition so far as the application of such rules does not in law or in fact prejudice the performance of the special duties entrusted to them. The development of trade shall not be thereby affected to a degree adverse to the interest of the Community.

(3) The Commission shall supervise the application of the provisions of this Article and shall where necessary address appropriate directives or decisions to Member States.

APPENDIX C[1]

MONOPOLY AND THE PUBLIC INTEREST

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SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Neither monopolies nor mergers necessarily operate against the public interest and an overrigid policy could detract from the efficiency of British industry as much as could the unrestricted growth of monopolies.

None the less since the war the British economy has suffered from too little rather than too much competition.

The present arrangements for the investigation and control of monopolies oi scale are not working satisfactorily.

By the time a monopoly situation has become firmly established it is often too late to do anything effective in practice to remedy it. Policy must therefore, to be effective, shift to prevention and come to grips with mergers threatening to create or accentuate a monopoly situation.

The Treaty of Rome is not incompatible with a stronger domestic policy on monopolies and mergers.

Though in some ways the American antitrust system is more effective than ours, there is little in the American system that would be suitable to our own conditions.

Recommendations

Our recommendations are based mainly on an extension and development of existing arrangements. They are:

(1) An independent Officer of the Crown, in a position analogous to the Registrar of Restrictive Trading Agreements, to be established to refer cases to the Monopolies Commission.

(2) This Registrar to be responsible also for presenting the evidence before the Commission, thus relieving the Commission of much of its preparatory work and separating its function of presentation from its responsibility for adjudication.

(3) Any merger proposal concerning a company with net assets exceeding £1m. or resulting in a combination of net assets exceeding £1.5m. to be notified to the Registrar.

(4) The Registrar to determine whether the merger is calculated to result in market dominance.

(5) Proposed mergers calculated to result in market dominance to be referred by the Registrar to the Monopolies Commission for advice as to whether the proposal is on balance calculated to bring gains to the public interest, not obtainable in other ways, sufficient to outweigh the public interest in maintaining competition. The Commission if so satisfied to recommend to the Board of Trade that the merger should proceed but not to preclude itself from subsequently investigating the resultant monopoly.

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[1] Containing the summary of the conclusions and recommendations of a British Conservative Party report prepared under the chairmanship of the Lord Poole, at the direction of the President of the Board of Trade, issued in March 1963.

(6) Completing such a merger to be illegal until either the Registrar has notified the company that in his view market dominance would not result or the Commission has made its recommendation.

(7) The Commission itself to be enlarged and enabled to operate in separate groups as when the Restrictive Practices Commission Act 1953 was in operation.

(8) Monopolies in commercial services to be subject to investigation.

(9) The Government to have powers where the Monopolies Commission so recommend to require regular returns, order divestment of assets or impose restrictions on prices.

(10) The terms "monopoly" and "public interest" to be more closely defined by statute.

STATEMENT OF THE MINORITY

When the proposal was made for the Antitrust and Monopoly Subcommittee to go to Europe for a series of conferences on the European Common Market, the minority members questioned its propriety and necessity for several reasons, including the heavy workload of investigations already scheduled to be conducted by the subcommittee. On that basis we determined that no member of the minority, or minority staff member, should accompany the majority representatives on the European trip. We reserve the right, however, to submit individual views on any report which the majority may make to the Senate.

EVERETT MCKINLEY DIRKSEN.
ROMAN L. HRUSKA.
KENNETH B. KEATING.